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Supreme Court of the United States

OCTOBER TERM, 1930
No. 43

UNITED STATES OF AMERICA,
Petitioner

vs.

IRON CAP COPPER COMPANY,
Respondent

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT IRON CAP COPPER COMPANY

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Attorney for Iron Cap Copper Company.

CONTENTS.

	PAGE
INTRODUCTORY STATEMENT.	1
STATEMENT OF FACTS.	4
STATUTES WHICH MAY BE MATERIAL.	12
Summary of Interest Provisions.	17
ARGUMENT	19
The True Date of Allowance of the Credits was August 7, 1924, when the Commissioner Finally Fixed and Approved both Credits and Refunds.	19
In any event the Date of Allowance could not be earlier than July 14, 1924, the date of the Collector's Subsidiary Schedule of Refunds and Credits.	34
Neither the Practice of the Bureau of Internal Revenue in Treating Date of Original Schedule of Overassessments as date of Allowance of Credits nor the Action of Congress (in the Revenue Act of 1926) in Fixing that date as date of Allowance of Refunds is Material.	46
CONCLUSION.	50

TABLE OF AUTHORITIES.

Cases.

PAGE

Andrews Steel Co. v. *United States* (Ct. Cl. June 2, 1930) 25

Atlas Powder Co. v. *United States*, 40 Fed. (2nd) 136 25

Blair v. *Birkenstock*, 271 U. S. 348 3

Boston Buick Co. v. *United States*, 27 Fed. (2nd) 395 (aff'd 35 Fed. (2nd) 560) 25, 34

Dickerman & Englis Inc. Appeal of, 5 B.T.A. 633.. 24

Girard Trust Co. v. *United States*, 270 U. S. 163 4, 11, 19, 27, 43, 44, 47

Hall, Estate of, 155 Minn. 46..... 28

Iron Cap Copper Co. v. *United States*, 31 Fed. (2nd) 628 (aff'd, 35 Fed. (2nd) 560)..... 25

McKnight v. *United States*, 13 Ct. Cl. 292 (aff'd 98 U. S. 179) 28

Penn Smokeless Coal Co. v. *United States*, 34 Fed. (2nd) 205 25

People v. *Gilroy*, 82 Hun. 500 28

Pottstown Iron Co. v. *United States*, 40 Fed. (2nd) 142 25

Swift & Co. v. *United States*, 68 Ct. Cl. 97..... 25

United States v. *Dickson*, 15 Peters 141..... 47

United States v. *Kaufman*, 96 U. S. 567..... 29

United States v. *Magnolia Petroleum Co.*, 276 U. S. 160 3

United States v. *Missouri Pacific R.R.*, 278 U. S. 269 47

West Leechburg Steel Co. v. *United States*, 40 Fed. (2nd) 131 25

STATUTES.

	PAGE
Revenue Act of 1921 (42 Stat. ch. 136).	7
Sec. 250 (b).	43
Sec. 252 (a).	12, 36
Sec. 1303.	38
Sec. 1315.	14
Sec. 1324 (a).	12, 17
Revenue Act of 1924 (43 Stat. ch. 234).	13
Sec. 227.	42
Sec. 271.	43
Sec. 272.	13
Sec. 281 (a).	13, 36
Sec. 1001.	38
Sec. 1011.	14
Sec. 1019.	14, 18, 49
Revenue Act of 1926 (44 Stat. ch. 27).	15
Sec. 271.	43
Sec. 284 (a).	15
Sec. 1116.	15, 18, 48
Revenue Act of 1928 (45 Stat. ch. 852).	16
Sec. 322 (a).	16
Sec. 614.	16, 18
Revised Statutes, Sec. 3220.	14
U. S. C. A. Title 26, Sec. 2.	38
U. S. C. A. Title 26, Sec. 34.	38
U. S. C. A. Title 26, Sec. 1245.	38
Treasury Rulings and Regulations.	
Reg. 62, Art. 1035.	40
Reg. 62, Art. 1040.	48
Reg. 65, Art. 1305.	39
Mim. 3361. (Cum. Bul. IV-2, p. 69).	42
Mim. 2383. (Cum. Bul. No. 2, June, 1920, p. 202).	42
Treasury Decision 3850. (Cum. Bul. V-1, p. 354).	46, 48

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UNITED STATES OF AMERICA,
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vs.

IRON CAP COPPER COMPANY,
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BRIEF FOR IRON CAP COPPER COMPANY.

This case is before this Court upon a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the First Circuit.

INTRODUCTORY STATEMENT.

This action was originally brought in the District Court of the United States for the District of Massachusetts by Iron Cap Copper Company to recover interest on certain amounts overpaid by said Iron Cap Copper Company for income and profits taxes for 1918 which were applied as credits on additional assessments for other years.

The case was heard in the District Court upon an agreed statement of facts and oral testimony by one witness on behalf of the Government. The Court found in favor of the plaintiff and entered judgment on June 24, 1929. (Rec. pp. 30-35).

The case was appealed by the Government to the United States Circuit Court of Appeals for the First Circuit, and the record there, in addition to the agreed statement of facts, contained certain additional facts as set out in the opinion of the District Judge and certain additional special findings. (Rec. pp. 20-29).

The United States Circuit Court of Appeals for the First Circuit affirmed the decision of the District Court and the Government filed a petition in this Court for a writ of certiorari to review said decision, said petition being granted by this Court March 17, 1930.

The question involved in this case is *when the credits were allowed,* that is, on which of the three following dates: (1) March 29, 1924, when the Commissioner certified a Schedule of Overassessments showing that the respondent (plaintiff) had been overassessed for 1918 in the sum of $180,322.66; (2) July 14, 1924, when the Collector determined what amount of the overpayment for 1918 was necessary to satisfy the additional assessments for other years, applied said amount against said assessments and reported back to the Commissioner showing the amounts of abatement and credit and the amount refundable as follows:

Abatement	$48,539.94
Credit	102,931.89
Refundable	28,850.83

(3) August 7, 1924, when the Deputy Commissioner cer-

tified to the Commissioner his approval and when the Commissioner signed the authorization to the Disbursing Clerk, the effect of which was to approve the action of the Collector, to fix finally the amount of the refund, and to authorize its payment.

The date of the allowance of the credit is material because if it was "allowed" *before* June 2, 1924 (the effective date of the Revenue Act of 1924) the legal result of the allowance is determined under the Revenue Act of 1921, while if it was "allowed" *after* June 2, 1924, the legal result is determined under the Revenue Act of 1924. It is the rule that interest on refunds is to be computed in conformity with the law in force at the time of the allowance of the refund:

> *United States* v. *Magnolia Petroleum Company,* 276 U. S. 160;
>
> *Blair, Commissioner,* v. *United States, ex rel. Birkenstock,* 271 U. S. 348;

and it is agreed by both the petitioner and the respondent that the same is true in the case of a claim for credit. (Petitioner's Brief, pp. 2-3).

If the credit in this case was allowed before June 2, 1924 and therefore under the Act of 1921, then interest on the credit would run *to* the date of allowance of the credit but only *from* six (6) months after filing of claim by respondent (plaintiff). If it was allowed after June 2, 1924, and therefore under the Act of 1924, then interest would run *from* date of payment of tax *to* the dates of the additional assessments against which the overpayment was credited.

The District Court and the Circuit Court of Appeals,

following the statement by this Court in *Girard Trust Company* v. *United States,* 270 U. S. 163, held that the date of allowance of the credit, like the date of allowance of the refund, was August 7, 1924, the date when the Commissioner signed his final schedule and authorized payment of the refund, that being the date when its "exact amount" was "finally fixed by competent authority" and that the respondent (plaintiff below) was, accordingly, entitled to interest on the amount of the credit under the Revenue Act of 1924.

The petitioner here contends that this decision was wrong and that the credit was allowed on March 29, 1924, when the Commissioner certified his first schedule which showed merely that there had been an overassessment. The respondent contends that the decision below was right and that the credit was allowed when the Commissioner finally fixed or approved its amount and authorized the refund. It is sufficient, however, in order to sustain the decree below, if it be found that the credit was allowed on July 14, 1924, the date when its amount was actually determined by the Collector and the credit actually applied.

STATEMENT OF FACTS.

The respondent (plaintiff below) duly filed its income and profits tax return for the year 1918, showing taxes due in the sum of $183,099.78, which amount was duly paid (Agreed Facts, Par. IV, Rec. p. 5). After an examination and audit the Commissioner determined that the respondent was liable to an additional tax for 1918 in the sum of $48,539.94 and on June 11, 1921, the Commissioner

made an additional assessment upon the respondent in that amount (Agreed Facts, Pars. VII-VIII, Rec. p. 5). This made a total assessment for 1918 of $231,639.72.

After various audits it was finally determined that the correct tax assessable upon the respondent for 1918 was $51,317.06 and that accordingly there had been an overassessment of $180,322.66 and on March 29, 1924, the Commissioner of Internal Revenue approved a "*Schedule of Overassessments*" which included the abovementioned overassessment upon the respondent for the year 1918 in the sum of $180,322.66. This schedule was transmitted to the Collector with the following "Authorization of Commissioner". (Agreed Facts, Pars. XII and XIV, Rec. pp. 6-7; Exh. 3, p. 12.)

"To the Collector.....District of Massachusetts

The amounts listed in column 4 as overassessments (or reductions of tax liability) are hereby approved, and the related claims, if any, allowed in the respective amounts indicated by the 'Certificates of Overassessment' or 'Notices of Adjustment of Refund' attached thereto.

You will immediately check such items against the accounts of the several taxpayers, and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated, in whole or in part, and make such abatements as may be warranted by the condition of the taxpayers' accounts for the years involved.

If any part of any such item is found to be an overpayment, you will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against the taxes due, if any, making the appropriate entries in your accounts. (This applies only to income, war profits, and excess profits taxes.) Such

credits will be entered in column 9, and placed in column 5 of a subsidiary Schedule of Refunds and Credits (Form 7805-A).

The balance, if any, of the overpayment will be entered in column 12, and placed in column 4 of the subsidiary schedule (Form 7805-A) referred to above, and an appropriate memorandum made upon the taxpayer's account.

You will thereupon complete and certify this schedule and the schedule upon Form 7805-A, and return the necessary copies of each to the Commissioner of Internal Revenue.

Date March 29, 1924.

D. H. BLAIR
Commissioner of Internal Revenue."

The Collector determined the respective amounts which were to be abated, credited and refunded and on July 14, 1924, returned the Schedule of Overassessments with the following certificate to the Commissioner. (Agreed Facts, Pars. XIII-XIV, Rec. p. 7; Exh. 3, p. 12.)

"CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items in this schedule have been checked against the accounts of the respective taxpayers concerned and the amounts indicated have been applied as abatements and credits on their accounts.

The amounts of overpayment and the net amounts refundable have been determined to be as indicated herein.

Date July 14, 1924.

Collector.....District of Mass.
M. E. NICHOLS"

Under the same date he also returned the subsidiary "Schedule of Refunds and Credits" (copy also annexed to Agreed Facts) with the following certificate (Rec. p. 13):

"CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items hereon are relisted as they appeared for refund or credit on an original schedule (bearing the same number) of overassessments and related claims, if any, heretofore approved and allowed by the Commissioner of Internal Revenue. An examination of the accounts of the several taxpayers named disclosed such items to be the portions of such previously allowed overassessments or reductions of tax liability subject to refund or credit.

Date July 14, 1924

M. E. NICHOLS
Collector.....District of Mass."

The Schedule of Overassessments as so returned by the Collector to the Commissioner showed the amount of abatement, $48,539.94, the amount of the credits, $102,931.89 (specifying particular taxes for other specific years upon which the credits were applied), and the amount to be refunded, $28,850.83. The subsidiary "Schedule of Refunds and Credits" again showed the amounts as listed "for refund or credit" on the Schedule of Overassessments but not the amount of abatement.

Without going into unnecessary detail regarding the taxes for other years, upon which taxes the $102,931.89, allowed as a credit, was applied, it is sufficient to state that the credit was all applied on *additional assessments*

and that the respective amounts so credited, the years to which the other taxes in question related, and the dates of the additional assessments were as follows. (Agreed Facts, Par. XV, Rec. p. 7. See also schedule attached to Collector's subsidiary "Schedule of Refunds and Credits".)

"Amounts Credited	Year Against Which Credited			Dates of Assessment
$ 6,300.77	Add'l	assessment	1917	8/18/18
50,962.85	"	"	"	5/25/20
59.85	"	"	1916	6/11/21
20,061.60	"	"	1917	6/11/21
20.04	"	"	1913	3/20/24
17.30	"	"	1914	3/20/24
14.74	"	"	1915	3/20/24
18.41	"	"	1916	3/20/24
25,476.33	"	"	1917	3/20/24
$102,931.89	Total amount credited."			

After the Collector had returned to the Commissioner the "Schedule of Overassessments" with the Collector's figures of abatement, credit and refund thereon and his subsidiary "Schedule of Refunds and Credits", again listing the amounts of the credits and the amounts of the refunds, the Deputy Commissioner certified to the Commissioner on August 7, 1924 (on the "Schedule of Refunds and Credits"), as follows (Rec. p. 13):

"CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed and the accrued interest, if any, listed in column 6 has been found due.

Date August 7, 1924

J. G. BRIGHT
Deputy Commissioner."

On the same date the Commissioner, on the same "Schedule of Refunds and Credits," signed the authorization for payment of the refunds in the following language (Rec. p. 13):

"AUTHORIZATION OF COMMISSIONER

To the Disbursing Clerk, Treasury Department:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due. Payment may, therefore, be made in the amounts shown in column 7.

Date August 7, 1924

D. H. BLAIR
Commissioner of Internal Revenue."

The amount of the *refund* was duly paid, and on February 21, 1928, in pursuance of a request by the respondent for an allowance of interest on its overpayment, the Commissioner advised the respondent of the

allowance of interest in the amount of $8,033.57 on $28,850.83, the amount *refunded,* from the date of payment of tax to August 7, 1924, the date of allowance of the refund. The schedule based on this computation and allowance of interest was approved on May 11, 1928, and payment was made on May 15, 1928. (Agreed Facts, Pars. XVII, XVIII, Rec. p. 8.)

The Commissioner declined to allow any further interest on account of the overpayment for the year 1918, and specifically no interest has been paid or allowed upon the amounts of the credits of $102,931.89. (Agreed Facts, Par. XX, Rec. p. 8.)

It was conceded below and is one of the special findings of fact made by the District Judge that there is no record of the actual date of applications of credits on the Collector's books and that the *official application of the credit by the Collector is the date on which he signs the subsidiary "Schedule of Refunds and Credits".* This date, in the present case, was July 14, 1924 (Rec. p. 29).

There are three possible dates upon which it may be argued the credits were "allowed". These dates are given above, but we repeat them here for convenience.

1. March 29, 1924, the date when the Commissioner signed and transmitted to the Collector his original "Schedule of Overassessments".

2. July 14, 1924, the date when the Collector (a) certified on the "Schedule of Overassessments" that he had checked the items of overassessments with the taxpayer's accounts and stated to the Commissioner the amounts which he had applied as abatements and credits on their accounts and the net amounts which he found to be refundable, and

(b) signed the subsidiary "Schedule of Refunds and Credits" again certifying the amounts which he had determined as the proper amounts of credit and refund.

3. August 7, 1924, the date when the Commissioner indicated his approval of the Collector's figures by signing the authorization for payment of the refunds.

Obviously, if the first of these dates is taken the allowance was made under the Revenue Act of 1921, while if either of the other dates is taken the allowance was made under the Revenue Act of 1924 and is governed by the provisions of that Act and the respondent (plaintiff) is entitled to the interest claimed.

The Government argues for the first of the three dates, namely, March 29, 1924, the date of the Commissioner's original Schedule of Overassessments. The respondent, on the other hand, argues that both under the authority of *Girard Trust Company* v. *United States*, 270 U. S. 163, and other decisions cited below, and as a matter of correct interpretation, the true date of allowance was August 7, 1924, when the Commissioner approved the amounts of the credits and refunds indicated by the Collector; or in the alternative, that the credits can not be said to have been allowed in any case earlier than July 14, 1924, the date of the Collector's certification on the schedules returned by him to the Commissioner, upon which schedules, for the first time the amounts of the abatements, credits and refunds to which the taxpayers were entitled were fixed and stated.

STATUTES WHICH MAY BE MATERIAL.

Revenue Act of 1921: (42 Stat. ch. 136)

"REFUNDS

Sec. 252 (a). That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' the Act of October 3, 1913, entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer:"

"INTEREST ON REFUNDS AND JUDGMENTS.

Sec. 1324. (a) That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows:

(1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or

(2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or

(3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit.

The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

Revenue Act of 1924: (43 Stat. ch. 234)

"OVERPAYMENTS.

Sec. 272. If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess shall be credited or refunded as provided in section 281."

"CREDITS AND REFUNDS.

Sec. 281. (a) Where there has been an overpayment of any income, war profits, or excess-profits tax imposed by this Act, the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

"INTEREST ON REFUNDS AND CREDITS.

Sec. 1019. Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part."

Revised Statutes, Section 3220:

(This section appeared as Section 1315 in the Revenue Act of 1921 and was reenacted without change as Section 1011 of the Revenue Act of 1924.)

"Sec. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector,

agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section."

Revenue Act of 1926: (44 Stat. ch. 27)

"CREDITS AND REFUNDS"

"SEC. 284. (a) Where there has been an over-payment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer."

"INTEREST ON REFUNDS AND CREDITS"

"SEC. 1116. (a) Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of

the allowance of the refund, or in the case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment made under the Revenue Act of 1921, the Revenue Act of 1924, or this Act, then to the date of the assessment of that amount.

(b) As used in this section—

(1) The term 'additional assessment' means a further assessment for a tax of the same character previously paid in part, and includes the assessment of a deficiency under Title II or Title III of the Revenue Act of 1924 or of this Act;

(2) The term 'date of the allowance of the refund' means, in the case of any income, war-profits, or excess-profits tax, the first date on which the Commissioner signs the schedule of overassessments in respect thereof.

(c) This section shall be applicable to any refund paid, and to any credit taken, on or after the date of the enactment of this Act, even though such refund or credit was allowed prior to such date."

Revenue Act of 1928: (45 Stat. ch. 852)

"REFUNDS AND CREDITS"

"SEC. 322. (a) AUTHORIZATION. Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer."

INTEREST ON OVERPAYMENTS

"SEC. 614. (a) Interest shall be allowed and paid upon any overpayment in respect of any internal

revenue tax, at the rate of 6 per centum per annum, as follows:

(1) In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment of a tax imposed by the Revenue Act of 1921 or any subsequent Revenue Act, then to the date of the assessment of that amount.

(2) In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than 30 days, such date to be determined by the Commissioner.

(b) As used in this section the term 'additional assessment' means a further assessment for a tax of the same character previously paid in part, and includes the assessment of a deficiency of any income or estate tax imposed by the Revenue Act of 1924 or by any subsequent revenue act.

(c) Section 1116 of the Revenue Act of 1926 is repealed.

(d) Subsections (a), (b), and (c) shall take effect on the expiration of thirty days after the enactment of this Act, and shall be applicable to any credit taken or refund paid after the expiration of such period, even though allowed prior thereto."

Summary of Interest Provisions

It may be helpful to summarize briefly the provisions of these various Acts with regard to interest on refunds and on credits as follows:

Act of 1921, *Sec.* 1324 (*a*):

Interest on refund or credit *from* date indicated below to date of allowance.

1. If amount was paid under specific protest, then from date tax was paid.
2. If paid without protest but pursuant to additional assessment, then from time additional assessment was paid.
3. If paid without protest and not pursuant to additional assessment, then from six months after filing claim.

Act of 1924, *Sec.* 1019:

Interest allowed on refund from date of payment of tax to date of allowance of refund.

Interest allowed on credit from date of payment of tax to

1. Due date of amount against which credit is taken, but
2. If taken against an additional assessment, then to date of assessment.

Act of 1926, *Sec.* 1116:

Interest allowed on refund from date of payment of tax to date of allowance of refund.

Interest allowed on credit from date of payment of tax to

1. Due date of amount against which credit is taken, but
2. If taken against additional assessment under Revenue Acts of 1921, 1924 or 1926, then to date of additional assessment.

Act of 1928, *Sec.* 614:

Interest allowed on refund from date of overpayment of tax to date not more than thirty days before date of refund check.

Interest allowed on credit from date of overpayment to

1. Due date of amount against which credit is taken, but
2. If taken against additional assessment under Revenue Act of 1921, or any subsequent revenue act, then to date of additional assessment.

ARGUMENT

This respondent submits the following arguments and authorities in support of its position that the decree below should be sustained.

I.

The True Date of "Allowance" of the Credits Was August 7, 1924, When the Commissioner Finally Fixed and Approved Both Credits and Refunds

In *Girard Trust Company* v. *United States*, 270 U. S. 163 (decided March 1, 1926) it was squarely held that the date of "allowance" of a refund was the date when the Commissioner took his final action, namely, when he approved the "Schedule of Refunds and Credits" and ordered payment of the refund. In that case the Commissioner had signed his Schedule of Overassessments on December 9, 1922. This schedule was sent to the Collector with the usual instructions to examine the accounts of the taxpayers, to make the abatements called for and to apply the credits and report back the amounts of credits and refunds (for details of Commissioner's authorization see Form 7777—Rec. pp. 21-

22). The Collector reported back to the Commissioner as directed and, on January 16, 1923, the Assistant Commissioner confirmed the report and the Commissioner directed the refund. It was held that the date of allowance of the refund, and the date to which interest on the refund must run, was January 16, 1923, when the Commissioner finally directed the refund. At pages 170-171, Chief Justice Taft says:

> "The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and that a refund *or credit* should be granted, and *when he has made that decision finally,* he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section.
>
> * * * * * * *
>
> The findings and the exhibits show that the course of business is that the Collector on receiving from the Commissioner the schedule as to the overassessment, examines his books and reports back to the Bureau the amount which should be credited on taxes due and the amount to be refunded, that this is examined by the Assistant Commissioner and then is delivered to the Commissioner, *who makes it effective by his approval.* Until it reaches him and is approved by him, the refund cannot be paid. *This we think is the real date of allowance. Until that time, the exact amount of the refund is not fixed finally by competent authority.* This date would seem to be just as certain and convenient from an administrative standpoint as that of the original decision of the Commissioner, and it is certainly more in conformity to the general purpose of Congress to relieve the overassessed taxpayer by paying compensatory interest on money unjustly taken and kept by the Government." (Italics ours.)

It seems reasonably clear that in the discussion just quoted the Supreme Court regarded credits and refunds in the same light and deemed the final date when the Commissioner approved the Collector's Schedule of Refunds and Credits to be the real date of allowance in either case.

It is the whole theory of the Government's brief that although the approval by the Commissioner of this final schedule, which included the authorization to the Disbursing Clerk to pay the refund, is the date of allowance of the *refund,* yet that the date of the original Schedule of Overassessments, which merely determined that the taxpayer had been *overassessed* for a given year, constituted an *allowance of credits* on additional assessments for other years, although the amount of those credits was not known to the Commissioner or determined by the Collector or the credits applied until long afterwards. This argument overlooks the fact that, under the opinion of the Court in the *Girard Trust Company* case, allowance of the refund involved not only a final decision that a refund should be paid but also a *final fixing of its amount.* Obviously the refund could not be "allowed" until its amount was fixed. And if the position thus taken by the Court was sound, that "the exact amount of the refund" must be "fixed finally by competent authority" (i.e. by the Commissioner) before the refund could be said to have been allowed, it must be equally true that the exact amount of a credit must be "fixed finally," and by competent authority, before the credit can be said to have been allowed.

In his original "Schedule of Overassessments" the Commissioner did not purport to fix the amount of either

credit or refund. He merely certified his decision that the taxpayer had been *overassessed* for a given year (1918) in a certain amount. He was not deciding, and indeed he could not decide, how much of the overassessment should be merely abated, how much should be credited on taxes for other years and how much should be refunded. For, as the record shows, the Commissioner had no knowledge of the status of the taxpayer's accounts, and only in the Collector's office was the necessary information available to determine how much of the overassessment found by the Commissioner was to be abated, how much to be credited and how much to be refunded. (Rec. p. 28). Before any of these items could be determined, the Collector, who is the Commissioner's subordinate and representative, must examine the taxpayer's accounts and ascertain (1) how much of the total assessment the taxpayer has paid, and (2) how much the taxpayer owes for unpaid taxes for other years. In this manner the Collector determines (1) what amount of the overassessment has not been paid and should therefore be abated, (2) what amount of the actual overpayment should be applied or credited on the unpaid taxes for other years, and (3) what is the balance of the overpayment, if any, which should be refunded.

If there are no unpaid taxes for other years, then the whole amount of the overpayment must be refunded. If there are unpaid taxes for other years, such amount of the overpayment as is necessary must be applied against those unpaid taxes, and the balance must be refunded. Obviously, *the amount of credits plus the amount of refund must in every case equal the total amount of*

overpayment. The amount of the credit and the amount of the refund are, therefore, of necessity finally fixed and determined *simultaneously*. The credit and the refund are complements of each other. If the amount of the credit were finally fixed at any earlier date the amount of the refund would necessarily be fixed by the same act.

The same necessity which exists under the present practice, for the Commissioner to be advised by the Collector as to the state of the taxpayer's account—as to the amount of overpayment, if any, and as to the amount of unpaid taxes for other years—before a credit can be allowed, existed also under the earlier practice. It is not a new condition. We quote from the record as follows:

> "In the early practice, before the commissioner could prepare a schedule of credits or a schedule of refunds or a schedule of abatements, he had to have information from the collector's office as to what taxes were due and how much the taxpayer had paid. Before the commissioner issued a schedule of credits the commissioner had to know how much the taxpayer had overpaid on the year in question. An overpayment would not be allowed to be credited without evidence of the actual overpayment." (Rec. p. 28.)

It would have been possible for this Court in the *Girard Trust Company* case to regard the date of the Schedule of Overassessment as the date of allowance of both credits and refunds, even though an investigation of facts in the Collector's office, following that original schedule, was necessary in order to determine the *amounts* of either credits or refunds. It might have

held that the Commissioner's ignorance of these facts and figures, which were necessary to fix the *amounts* of the credits or refunds, was not material because both could readily be computed when the Collector had examined the accounts. The Court, however, chose to regard the "allowance" of the refund as a *conscious act*, which could only become effective when the Commissioner *knew* the facts and could determine the *exact amount* which should be refunded. The allowance of a refund was a definite decision that a stated amount of refund was due the taxpayer. For in fixing as the date of "allowance" the date of the Commissioner's final approval of the schedules after they were returned to him by the Collector, the Court said: (p. 171).

> "This we think is the real date of allowance. Until that time the exact amount of the refund is not fixed finally by competent authority."

This language indicates that this final date was selected, not because the Commissioner then ordered the payment made but *because that was the date when the exact amount was finally fixed.*

The distinction between the certifying by the Commissioner of the "Schedule of Overassessments" and the allowing of a credit has been regarded by the United States Board of Tax Appeals as an obvious distinction, for in the *Appeal of Dickerman & Englis, Inc.*, 5 B.T.A. 633, the Board said, page 635:

> "It would seem unnecessary to point out the distinction between a determination that the taxpayer has made an overpayment of tax and a determination that the taxpayer is entitled to a credit or to a refund."

With only one exception, and that apparent rather than real, all the decisions of the lower courts which have passed upon this question of when a credit is allowed are unanimous in sustaining the contentions of this respondent.

Swift and Company v. *United States*, 68 Ct. Cls. 97;

Iron Cap Copper Company Case, (U. S. D. Ct. Mass.) 31 Fed. (2nd) 628;

Iron Cap Copper Company Case, (U. S. C. C. A. 1st Circ.) 35 Fed. (2nd) 560;

Boston Buick Case, (U. S. D. Ct. Mass.) 27 Fed. (2nd) 395;

Boston Buick Case, (U. S. C. C. A. 1st Circ.) 35 Fed. (2nd) 560;

Andrews Steel Company v. *U. S.*, Ct. of Cls. June 2, 1930;

West Leechburg Steel Co. v. *United States*, 40 Fed. (2nd) 131;

Atlas Powder Co. v. *United States*, 40 Fed. (2nd) 136;

Pottstown Iron Co. v. *United States*, 40 Fed. (2nd) 142.

The only apparent dissent is that in *Penn Smokeless Coal Company vs. United States*, 34 Fed. (2d) 205, in which, as the United States Circuit Court of Appeals in the present cases said, "the sitting judge * * * inadvertently misconstrued the opinion of the Chief Justice in the *Girard Trust Company* case." (Rec. p. 41.) The mistake of the court in that case is so evident that it may well be assumed the court itself would have been the first to correct it if it had but been called to his attention.

In that case it appears that the Schedule of Overassessments was signed and transmitted to the Collector on January 13, 1926; that the Collector on January 28, 1926, certified and returned to the Commissioner the Schedule of Refunds and Credits and that the approval and authorization of the Commissioner was signed on March 11, 1926. The issue was whether the credit was allowed under the Revenue Act of 1926 which became effective February 26, 1926, or under the previous act, that of 1924. It was held that the credit was allowed prior to the effective date of the 1926 Act and the language of the court indicates the view that the credit was allowed when the Commissioner signed the original Schedule of Overassessments. This is in accord with the Government's theory. An examination of the case shows however, that it was decided under a palpable misapprehension of what Chief Justice Taft had stated in *Girard Trust Company vs. United States*, for in the course of its opinion the Court says: (pp. 208-209.)

> "In Girard Trust Co. vs. United States, supra, the Court, in the opinion by Mr. Chief Justice Taft, laid down a rule, as follows: 'A claim for refund or credit is allowed within the meaning of the statute when the Commissioner approves the schedule in whole or in part for transmission to the proper accounting officer for credit or refund.' * * * * * Applying the rule laid down in Girard Trust Co. vs. United States to the actual procedure in the Bureau of Internal Revenue, the credit to the plaintiff was allowed when the Commissioner approved the Schedule of Overassessments * * * * * for transmission to the Collector, and thus directed the latter to credit plaintiff with the amount of its overpayments of 1918 taxes against other taxes owed by it."

This statement by the District Court of "the rule laid down" by the Chief Justice in the *Girard Trust Company* case is erroneous and is directly *contra* to what the Chief Justice actually said. What the Chief Justice did say in the *Girard Trust Company* case appears at pages 169, 170, 171 thereof, as follows:

> "The Treasury Department by its regulations of 1922 construed this provision as follows:
>
> > 'A claim for refund or credit is allowed within the meaning of the statute when the Commissioner approves the schedule in whole or in part, for transmission to the proper accounting officer, for credit or refund.' • • •
>
> We cannot concur, however, in the view of the Treasury Department that the date of the allowance of the claim as intended by the statute is the date when the Commissioner first decides that there has been an overassessment and sends upon a proper form his decision to the Collector of Internal Revenue, who made the collection and keeps the account with the taxpayer."

And obviously the *decision* in the *Girard Trust Company* case was directly *contra* to the regulation quoted. In other words, what the Pennsylvania Court cites as a rule laid down by the Chief Justice, was in reality a rule which the Chief Justice said the Treasury Department had laid down but in which this Court refused to concur.

The following cases by analogy support the *dictum* of this Court in the *Girard Trust Company* case, that the Commissioner's final approval is the "real date of allowance" as to credits as well as refunds, for they indicate that a claim is not "allowed" until its *amount* is fixed, or until the official authorized to make the allowance, being advised of the amount, approves it.

In Re Estate of Hall, 155 Minn. 46, the Probate Court had made findings of fact and conclusions of law to the effect that the husband should

> "have and take his distributive share of the estate * * * under the provisions of the statutes of this state, the same as if said deceased had died intestate, in lieu of the provisions made for him by * * * said will".

The executor appealed under a statute which permitted appeal from an order or decree by which a "distributive share is allowed or payment thereof directed, or said allowance or direction refused". The Court said, p. 49:

> "The order does not purport to assign or distribute the property or any part thereof. It merely decides that respondent's rights are to be determined by the statute and not by the will. It does not give respondent the right to any specific property, or to any specific part or amount of the property. A further order or decree is necessary to carry it into effect. Before respondent will be in position to demand or receive any part of the property, a further order or decree must be made assigning it to him. * * * * * We think that respondent's claim to a distributive share of the personal property is not 'allowed' within the meaning of the statute, until an order or decree is made under which he is entitled to demand or receive it, or some part of it."

In *McKnight vs. United States*, 13 Ct. Cl. 292, affirmed 98 U. S. 179, it was held that allowance of a claim was the final action by the officer authorized under the law to act in the matter of such allowance and that all previous steps of accounting officers and others were merely preliminary.

In *People vs. Gilroy*, 82 Hun. 500, which involved the

allowance of a claim against a municipal corporation, Mr. Justice Follett used the following language: (p. 507)

> "To audit an account is to examine and ascertain whether it is accurate. To allow an account or claim is to accept or admit it as a legal demand. The authority to audit and allow an account primarily implies the right to determine whether it is an accurate and just claim".

It is difficult to see how a claim can be "accepted or admitted as a legal demand" unless or until its amount is known.

In *United States vs. Kaufman*, 96 U. S. 567, which involved a claim for refund of a special stamp tax, which claim had been allowed by the Commissioner, this court said (p. 570):

> "To say the least, the allowance of a claim under this statute is equivalent to an account stated between private parties, which is good until impeached for fraud or mistake".

An "account stated" necessarily involves a fixing of the amount.

The essence of the transaction, where a credit on account of overpayment of tax for one year is "allowed" against unpaid taxes for other years, is merely that one of two adverse claims is set off against the other. It would be foreign to any known practice to hold that, as between private parties, one of such claims could be set off against the other before their respective amounts had been determined, so that the balance could be struck and the account between them definitely stated.

Nor is there anything "ungrammatical" or "incongruous" in holding that the allowance of both refunds

and credits takes place on the date *when the Commissioner for the first time fixes and determines the amount of each,* namely, when he approves the *final schedule.* This conclusion is consistent with both the decision and the *dictum* in the *Girard Trust Company* case; it is also consistent with the Government's own theory in this case that the Commissioner must act *personally* in the allowance of either credit or refund. It cannot matter that, with respect to the refund, it involves an order for payment, while in the case of the credit it is only a ratification. It is conceded in the Government brief (p. 25) that an approval or ratification "is a recognized meaning of allowance."

If the word "allowance," is interpreted in the sense of "approval," it may look either forward or backward, and the fancied difficulty which confronts counsel for the Government readily disappears. While in the case of a refund approval must, of course, precede the payment, yet in the case of a credit it may be either before or after the credit is applied. If in the usual course the approval follows the application, any error which the Collector has made can be corrected, because the credit in the nature of things cannot be final until the approval is given.

But it appears from the record that *if* the Schedule of Refunds and Credits discloses *no refundable items* of tax and no interest on credits

> "the instructions were to mark the original schedule of refunds and credits as cancelled, place it in a special loose leaf binder for reference, if necessary, to likewise mark the Bureau record copy as cancelled, indicate where the original was on file and file the Bureau record copy in its proper place according to the serial number"

and that in these cases no final certificate was signed by the Commissioner of Internal Revenue. (Rec. p. 26.)

But, even in those cases where the Commissioner does not actually sign the final schedule, *it is not difficult to find, in the procedure indicated, a sufficient official action on the part of the Commissioner approving the Schedule of Refunds and Credits* as returned to him by the Collector. There must be the same examination of the schedule even where there are no refunds to be paid and no interest to be paid on allowed credits, because there is the same necessity for checking the action of the Collector to see that the amounts of abatements and credits which he has allowed do not exceed the amount of the overassessment approved by the Commissioner on his original Schedule of Overassessments. (Rec. p. 29.) In other words, the "cancellation" of the Schedule of Refunds and Credits and the filing of the Bureau copy, after the accounts have been thus checked in the Commissioner's office, may well be deemed equally effective as a final allowance of credits as if the schedule had contained items of refund or interest and so had been signed by the Commissioner to authorize the refund or interest payments.

Indeed, the cases where an actual signing of the authorization to the Disbursing Clerk is not required must be very rare as the Schedules of Overassessment and the subsidiary Schedules of Refunds and Credits ordinarily refer not to a single taxpayer but to a large number of taxpayers, and obviously if any one of these was entitled to a refund, or to interest on an allowed credit, the authorization to the Disbursing Clerk would be signed by the Commissioner. It also seems a fair assumption

that credits allowed would ordinarily carry interest so that the authorization to the Disbursing Clerk would be signed by the Commissioner simply for that reason, if for no other. We assume it will not be argued that the signing by the Commissioner of the authorization to the Disbursing Clerk does not constitute his approval of the entire Schedule of Refunds and Credits even though there were but a single refund or interest item to be paid.

It is argued for the Government that a refund can not be made until after the credit has been allowed and applied and it is attempted to be inferred that some substantial time must elapse between the allowance of the credit and the allowance of the refund. No good reason appears, however, why the allowance of refund and credit may not be *simultaneous*. It is certainly clear that neither credit nor refund can be allowed until it has been found and determined that the taxpayer has *overpaid* his proper tax. It is equally clear that the *amounts* of credit and refund respectively are fixed and determined at one and the same time, because their sum equals the overpayment.

Finally, it may be appropriate, as bearing on the view taken by the Treasury Department itself, as to the date of the allowance of the credit in the case now under consideration, to refer to the so-called "Certificate of Overassessment" (not to be confused with the Schedule of Overassessments which was signed March 29, 1924) which was sent to this respondent (plaintiff) with the refund check *after* the final Schedule of Refunds and Credits which was signed on August 7, 1924. This Certificate of Overassessment appears on page 14 of the Record. It bears no date but it obviously *followed* the

final approval of the Schedule of Refunds & Credits by the Commissioner, because it comes from the Commissioner's office, indicates the amount of abatement, the amounts of the credits in detail with the particular additional assessments for other years on which the credits have been applied by the Collector, and states the amount of the refund; and it purports to carry the treasury check for the refund. It will be noted that this Certificate of Overassessment states that the amount of the overassessment "*will be* abated, credited or refunded as indicated below". Even at this late date, therefore, the credit is apparently to be made in the future.

It is suggested in the Government's brief (p. 13) that this argument is "unsound and misleading," and reference is made to the record in this case (p. 21) as authority for the statement that the Certificate of Overassessment and the Schedule of Overassessments were forwarded together by the Commissioner to the Collector. As we understand the record, the statements on page 21 refer to an earlier procedure. But however this may be, the actual Certificate of Overassessment in this case, (Rec. p. 14) shows the details above described and it purports to carry the treasury check for the refund. Therefore, it must have been *sent out either by the Commissioner or with his express authority after* the Collector's schedules had been returned to him and he had signed the final schedules under which the refund was paid.

II

In Any Event the Date of "Allowance" Could Not Be Earlier Than July 14, 1924, the Date of the Collector's Subsidiary "Schedule of Refunds and Credits"

Even if it were to be held that the allowance of the credit precedes the date of approval of the final schedules by the Commissioner, it is certainly clear in any case that the amount of the credit was not "finally fixed by competent authority" and, consequently, cannot be regarded as "allowed", at any date earlier than the date when the Collector certified the "Schedule of Refunds and Credits," which he returned to the Commissioner, namely, July 14, 1924.

In *Boston Buick Company* v. *United States*, 27 Fed. (2nd) 395, the District Court found it unnecessary to decide whether the real date of allowance was the date when the Collector returned his schedules to the Commissioner or the date when the Commissioner finally approved those schedules, because either date was subsequent to June 2, 1924, the effective date of the 1924 Act. Judge Brewster, however, in delivering the opinion of the Court, indicated his clear opinion that, whatever date should be taken as the date of the allowance of the credit, it certainly was *not* the date when the Commissioner signed his first schedule showing that the taxpayer had been overassessed. The Court there said, page 396:

> "However, I think, in view of *Girard Trust Company* v. *United States, supra*, it can be taken as settled

that the transmission of the schedule of overassessments does not constitute an allowance of either a credit or a refund. A ministerial act of another administrative officer is necessary before it can be determined that there will be any credit, or before the exact amount of it can be ascertained. * * * Until then, to borrow from the language of the Chief Justice in the Girard Trust Company case, the exact amount of the credit was 'not fixed finally by competent authority' ".

The form of the transaction and the language of the communications between the Commissioner and the Collector amply support this view. The authorization of the Commissioner on the original Schedule of Overassessments is directed to the Collector and contains the following significant language:

"The amounts listed in column 4 as *overassessments* (or *reductions of tax liability*) are hereby approved. * * * .

You will immediately *check such items against the accounts* of the several taxpayers *and determine whether the amounts* in which the tax liabilities have been reduced *should be respectively abated*, in whole or in part and make such abatements * * .

If any part of any such item *is found to be an overpayment* you will examine all accounts of the taxpayer for other periods *and apply the overpayment as a credit against the taxes* due, if any, making the appropriate entries in your accounts * * * . Such credits will be entered in column 9 and placed in column 5 of a subsidiary schedule of refunds and credits.

The balance, if any, of the overpayment will be entered in column 12 and placed in column 4 of the subsidiary schedule referred to above". (*Italics ours.*)

Nothing in this authorization purports to be an allowance of either a *credit* or a *refund*. It is merely a statement of the amounts in which taxpayers have been *overassessed* and a direction to the Collector *to examine the accounts and determine* to what extent the taxpayers' liability *should be abated;* and if the proper amount of tax, as thus determined by the Commissioner, has been *overpaid* then the Collector is *to examine* all accounts of the taxpayer for other periods and *apply the amount of the overpayment as a credit* on these other taxes. Then if there remains any balance of the overpayment, such balance is to be listed as the amount refundable to the taxpayer.

The language of the statutes which we have quoted above indicates clearly that *before any credits can be allowed the fact of overpayment must appear.* In Section 252 (a) of the 1921 Act it is provided that

> "If upon examination of any return of income * * * *it appears that an amount of* * * * *tax has been paid in excess of that properly due,* then * * * the amount of the excess shall be credited against any income * * * taxes * * * due from the taxpayer, etc." (Italics ours.)

Section 281 (a) of the 1924 Act provides that

> "Where there has been an overpayment, etc., the amount of such overpayment shall be credited, etc."

Until the Collector has made his investigation of the taxpayer's accounts and has ascertained how much of the overassessment has been actually overpaid and how much of this overpayment is to be claimed by the Government on unpaid taxes for other years, neither the Collector nor anyone else can determine what the credit

is to be, *or even that there is to be a credit at all.* It is conceded on the part of the Government that there is no official action by the Collector in the matter until he certifies the schedules which are to go back to the Commissioner, and that "the official application of a credit * * * * is the date on which he signs the subsidiary schedule." (Rec. p. 29.) This schedule he certified in the present case on July 14, 1924, and if the date of "allowance" of the credit is to be moved back from the date when the Commissioner affixes his final approval to the schedules, it can not be fixed earlier than the date when the Collector, on behalf of and under the express authorization of the Commissioner, first determined the amount of the credit. The Collector is the subordinate of the Commissioner and his action in determining and applying the credits is taken under the Commissioner's *express authority.* His action, therefore, may be deemed the action of the Commissioner for the purpose of "fixing finally by competent authority" the "exact amount" of the credit. This act of the Collector is the "ministerial act of another administrative officer" which is referred to by Judge Brewster in *Boston Buick Co.* v. *United States,* supra, as being "necessary before it can be determined that there will be any credit or before the exact amount of it can be ascertained."

It is argued on behalf of the Government that the date of the allowance or application of these credits by the Collector on the taxes for other years cannot possibly be treated as the date of the "allowance," because the authority and duties of the Commissioner and of the Collector are statutory, and to permit the Collector to

"allow" a credit would involve a delegation to the Collector of a power or authority which is vested by law only in the Commissioner.

It is quite true that the authority and duties of the Commissioner and the Collector are prescribed by statute. The brief for the Government (pp. 14-15) quotes, from the Revenue Act of 1921, a provision authorizing the Commissioner, under Regulations prescribed by the Secretary of the Treasury, "to remit, refund and pay back all taxes erroneously or illegally assessed or collected," etc. and, from the Revised Statutes, a provision that the Collector is chargeable for all taxes committed to him for collection. But the Statutes also provide (U. S. C. A. Title 26, Sec. 2) that the Commissioner

> "shall have general superintendence of the assessment and collection of all duties and taxes imposed by any law providing internal revenue; and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps and other matters pertaining to the assessment and collection of internal revenue."

And, among the "duties of collectors and agents" (U. S. C. A. Title 26, Sec. 34), we also find that Collectors "shall see that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with," etc.

Both the Revenue Act of 1921 (sec. 1303) and the Revenue Act of 1924 (sec. 1001) give the Commissioner express authority, with the approval of the Secretary of the Treasury, to prescribe "all needful rules and regulations for the enforcement of this act"; and, as set out in U. S. C. A. Title 26, Sec. 1245, the following language is added:

"and wherever the mode or time of assessing or collecting any tax which is imposed is not provided for, the said commissioner may establish the same by regulation."

We find in the regulations promulgated under the 1924 Act (Reg. 65, Art. 1305) the following:

"Action on claims for credit.—Upon receipt by the collector of a claim for credit on Form 843, he will make proper record thereof in his office, and, *except in the case of claims covering taxes assessed on the basis of returns on Form* 1040 *A and on the basis of such other returns as the collector is authorized by the Commissioner to audit*, forward the claim immediately to the Commissioner, irrespective of whether or not a claim for refund of the tax now claimed as a credit has previously been filed. Due notice will be given the collector and the taxpayer of the action taken on the claim. *Claims for credit covering taxes assessed on the basis of returns which the Commissioner has authorized the collector to audit shall be examined by the collector.* He shall then notify the taxpayer *of his action on the claim* and the taxpayer may, upon receipt of such notice, appeal to the Commissioner from the action of the collector.

If a claim is allowed against additional taxes due for other years, but such other taxes have not yet been assessed, the amount of the excess of such taxes over the overpayment shall be assessed or the excess of the overpayment of such taxes due shall be refunded as the case may be. The effective date of the filing of the claim for credit shall be the actual date of presentation to the collector.

Under no circumstances will a taxpayer be entitled to credit for an alleged overpayment of tax prior to

the allowance of such credit by the Commissioner." (Italics ours.)

Returns on Form 1040-A are the individual income tax returns for net incomes not exceeding $5,000; and the above regulation obviously prescribes a procedure whereby the Collector is expressly authorized to audit certain returns and *to allow or disallow claims for credit* upon his own individual decision subject, however, to an appeal to the Commissioner if the taxpayer is not satisfied with the Collector's action. The language of the regulation quoted above, having in mind particularly the last short paragraph, seems to indicate, as regards these claims for credit which were to be passed on by the Collector, either that the action of the Collector in allowing a credit was deemed an allowance by the Commissioner or else that the claim was not regarded as allowed until the Commissioner had approved the Collector's action either on an appeal by the taxpayer or under the general practice.

In the regulations under the Revenue Act of 1921 this practice is not so clearly defined as in the regulation above quoted, but those regulations, (Reg. 62, Art. 1035), appear to indicate that the same practice prevailed under said Act of 1921 under which the Collector audited certain returns and personally allowed or disallowed claims for credit.

There is, therefore, nothing inconsistent with the Commissioner's prerogative and authority in holding that, when the Collector, after receiving the Certificate of Overassessment from the Commissioner, first examined the taxpayer's account for the year in question and so determined the amount the taxpayer had overpaid, and

then examined the accounts for other years and so determined what taxes for those years were unpaid and how much of the overpayment was to be applied thereon, and made such application, he then, as the agent and representative of the Commissioner for this purpose, "allowed" the credit. The Government brief concedes that the relation between the Commissioner and the Collector is such that "the Commissioner's directions are to be carried out by the Collector," (p. 15) and the language above quoted from the Schedule of Overassessments which the Commissioner sent to the Collector, shows that the Commissioner was giving directions to the Collector, while the subsequent procedure shows that the Collector was carrying out those directions.

Under the practice above discussed the Collector, in connection with returns of income under $5,000, was given *general* authority to allow credits, whereas under the practice we are discussing in the present case, which was followed where larger amounts were involved, the authority to the Collector is *specific* in each case.

In any large corporate organization many acts, which are the function of the head of the organization to perform, must of necessity be performed by other individuals under delegated authority; and this must inevitably be true of such a large and complicated organization as the Bureau of Internal Revenue of the United States. The practice authorized in Article 1305 of Regulations 65, above quoted, under which the Collector acts on certain claims for credit, is one illustration of this. Another is found in the discretionary power which the Commissioner confers upon Collectors to grant extensions of time, under certain conditions, for filing income

tax returns. The Revenue Act of 1924, Sec. 227, expressly gave this discretion to the Commissioner and required him to keep a record of every such extension and the reason therefor, and yet it appears that Collectors, under general orders of the Commissioner, were authorized to grant such extensions. In Cum. Bul. IV-2, p. 69, Mim. 3361, which was a general communication from the Commissioner to the Collectors dated November 20, 1925, appears the following:

> "Collectors of Internal Revenue are hereby *authorized to grant extensions of time* for filing returns of income in cases of the absence, sickness or inability to secure data to make a correct return. In the granting of such extensions the following must be observed.
>
> * * * * *
>
> (Here are stated various requirements or conditions among which is the statement that communications granting extensions should be signed in the name of the Commissioner by the Collector with the statement):
>
> *"The Commissioner's name should be typed and the Collector's name written with pen and ink."*

The last paragraph in this communication reads as follows:

> "Due publicity should be given the mimeograph *so as to avoid applications for extensions of time for filing income tax returns being submitted direct to the Commissioner's office."* (Italics ours.)

The Revenue Act of 1918 similarly vested in the Commissioner a discretion to grant extensions of time for filing returns, and yet we find, in Cum. Bul. No. 2 (January—June 1920) page 202, Mim. 2383, a provision much

simpler in form than the later mimeograph but yet authorizing Collectors in cases of sickness or absence to grant extensions of time not to exceed thirty (30) days.

As a matter of fact the Government does not cite in its brief any provision of the Statutes which provides expressly that the Commissioner must *personally* allow credits. The Revenue Act of 1918, Sec. 250 (b), the Revenue Act of 1921, Sec. 250 (b), the Revenue Act of 1924, Sec. 271, and the Revenue Act of 1926, Sec. 271 do provide that as soon as practicable after returns are filed the Commissioner shall examine them and determine the correct amount of tax. They provide in substance that any overpayment *shall be credited* on taxes for other years and the balance refunded to the taxpayer. Strictly the question which the Commission is directed to determine is merely *the amount of the tax.* The allowance of the credit, depending as it does on the state of the taxpayer's accounts for other years, may well, so far as the Statutes are concerned, be determined *in toto* by the Collector, when once he has been advised by the Commisioner how much has been overassessed and has ascertained from his own records how much of the overassessment has been paid.

If it is argued that this action of the Collector can not be final because it may be reversed or disapproved by the Commissioner, the answer is obvious, that it may well be deemed final unless and until so reversed or disapproved. As the court said in the *Girard Trust Company* case, page 170:

> "The mere fact that he can reverse a final allowance does not prevent its being a final allowance, any more than when a court renders a judgment, its ability with-

in the term to set it aside or change it affects its finality, if it is not changed."

One other consideration mentioned by the court in the *Girard Trust Company* opinion namely, that of justice to the taxpayer whose money has been withheld by the Government, is worthy of notice here. While the date of allowance of a credit plays no part in the computation of interest under the Revenue Act of 1924, it *was* important under the Revenue Act of 1921, since interest on the credit ran *to that date*. These considerations therefore are pertinent in fixing what constituted the date of allowance under the 1921 Act, and no reason appears for reaching a different conclusion as to date of allowance under the 1924 Act. In the *Girard Trust Company* case this Court said (p. 170):

> "It is said that this is a remedial statute and was intended to require the Government to recoup the taxpayer unjustly dealt with by paying interest during the whole time the money was detained. That was doubtless its general purpose. But the statute is to be construed in the light of the difficulties of the Government bookkeeping and accounting."

It was this latter consideration, the Court said, which led Congress to provide for interest to date of allowance rather than to date of payment of refund and thereby to "qualify its desire" to do complete justice to the taxpayer; and which induced the Court to hold that the words "to the date of such allowance" did not carry interest to the date when the refund was paid.

The consideration due the taxpayer in the matter of interest is as important in the case of a credit as in that of a refund. Every consideration of justice dictates that

interest on the amount applied as a credit (under the 1921 Act) should run, if possible, to the date of such application, particularly as the taxpayer is charged with interest on his unpaid tax to the date of actual payment.

> Revenue Act of 1921, Sec. 250, Reg. 62, Art. 1003;
> Revenue Act of 1924, Sec. 276, Reg. 65, Art. 1261.

The date when the Collector returns the Schedule of Overassessments to the Commissioner with the subsidiary Schedule of Refunds and Credits is as definite, from the viewpoint of Government bookkeeping and accounting, as the date when the Commissioner first signs the Schedule of Overassessments for transmission to the Collector. The language of this court in the *Girard Trust Company* case. which was applied there to the date of the Commissioner's approved of the final schedule, is equally appropriate here either to that date or to the date when the Collector applies the credits and returns his schedules to the Commissioner. The Court said (p. 171):

> "This date would seem to be just as certain and convenient from an administrative standpoint as that of the original decision of the Commissioner, and it is certainly more in conformity to the general purpose of Congress to relieve the overassessed taxpayer by paying compensatory interest on money unjustly taken and kept by the Government."

III

Neither the Practice of the Bureau of Internal Revenue in Treating the Date of the Original Schedule of Overassessments as the Date of Allowance of Credits Nor the Action of Congress (in the Revenue Act of 1926) in Fixing That Date as the Date of Allowance of Refunds is Material

It is stated in the record in this case (p. 29) that the Bureau practice has treated the date of signing the Schedule of Overassessments as the date of allowance of a credit; although it is conceded in the Government's brief (p. 33 note) that for a period of between four and five months, beginning shortly after the decision in the *Girard Trust Company* case, (i.e. while Treasury Decision 3850, Cum. Bul. V-1, p. 354 was in effect) a credit, like a refund, was deemed to be allowed when the Commissioner signed his final Schedule of Refunds and Credits. It is intimated in the Government's brief that Treasury Decision 3850 was "a hurried and ill considered" acceptance of the *dictum* in the *Girard Trust Company* case (p. 34 note); and it is argued that this practice of the Bureau, coupled with the action of Congress in the Revenue Act of 1926, in fixing the time when *refunds* should be deemed to be allowed, should be controlling also in fixing the allowance of a *credit* at the time the Commissioner signs the original Schedule of Overassessments.

There are several answers to this suggestion:

First, that while the construction given by the Department is "entitled to great respect," nevertheless

> "if it (that construction) is not in conformity to the true intendment and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice. * * *
>
> The present question, then, must be decided upon the same principles by which we ascertain the interpretation of all other laws; by the intention of the Legislature as it is to be deduced from the language and the apparent object of the enactment." *United States* vs. *Dickson,* 15 *Peters* 141, 161-162;

Second, that the court is not bound in any case by such construction and that

> "if such interpretation has not been uniform, it is not entitled to such respect or weight, but will be taken into account only to the extent that it is supported by valid reasons." (Citing numerous cases.) *United States* vs. *Missouri Pacific Railroad,* 278 U. S. 269, 280;

Third, that the same practice in the Department had existed apparently with entire uniformity as regards allowance of *refunds* until the decision of this court in the *Girard Trust Company* case, which expressly disapproved the practice. As Mr. Justice Wilson noted in the opinion of the Circuit Court of Appeals in this case (Rec. p. 40):

> "It (the Treasury Department) also, prior to the decision in the Girard Trust Company case, had the same regulation as to the date of allowance of refunds; yet the court in that case held that a regulation of of the Treasury Department and its practice in this respect was not in accord with the statute and that it

did not control the plain effect of the acts of the Commissioner and the Collector. No good reason is now shown why the Department regulation as to the allowance of credits should control what appears to be the only reasonable inference to be drawn from the facts.";

Fourth, the practice of the Bureau in disregarding the *dictum* of this court (March 1, 1926) in the *Girard Trust Company* case, which *dictum* has been followed since that time with practical uniformity by the lower courts, is hardly entitled to consideration. Whether or not Treasury Decision 3850, which was in accord with the *dictum* of this court in holding that credits, as well as refunds, were allowed when the Comissioner signed his last schedule was "hurried and ill considered," certainly the rescission of that Treasury Decision in August 1926 in the face of that *dictum,* had no justification.

The persistence of the Department in readopting and then following its former practice, in the face of that *dictum* and those decisions of the lower courts, of course furnishes no reason for changing the rule thus laid down by this court and the lower courts, if that rule appears otherwise to be a sound interpretation of the law.

It is also claimed for the Government that Congress, by Section 1019 of the Revenue Act of 1924, approved the provisions of Regulations 62, Art. 1040, promulgated under the Act of 1921, which stated that a claim for refund or credit was allowed when the Commissioner approved the Schedule of Overassessments; and that Congress again approved the practice by Section 1116 (b) (2) of the Revenue Act of 1926, which provided that the date of allowance of a *refund* was the date of the Schedule of Overassessments.

Regarding the first of these contentions, it is perhaps sufficient to say that Section 1019 of the Revenue Act of 1924, providing that *upon* the allowance of a credit or refund interest should be allowed and paid, can hardly be deemed an approval of a regulation of the Department stating the *time* at which such claim was to be regarded as allowed. Moreover, the Regulation in question (Reg. 62, Art. 1040) was the very one which this Court in the *Girard Trust Company* case *expressly disapproved.* (pp. 169-170.)

So far as the Revenue Act of 1926 is concerned, it should be noted that, while the date of allowance of a refund still continued to be material under the 1926 Act because interest ran *to that date,* the date of allowance of a credit had become immaterial under the Act of 1924 and is still immaterial, as interest under the 1924 Act and under each of the Acts since that time is computed either to the due date of the amount against which the credit is taken or, if taken against an additional assessment (under the Revenue Act of 1921 or any later Act), then to the date of the additional assessment. After 1924, the date of allowance of the credit no longer figured in the computation of the interest on the credit. Under these circumstances the fact that Congress, while providing that a refund should be deemed allowed when the original Schedule of Overassessments is signed, said nothing about the time when a credit should be allowed, would seem rather to indicate that Congress intended to express no opinion upon this question of allowance of credits.

The Government undertakes to argue from the fact that the *Girard Trust Company* case was argued in Jan-

uary of 1926, before the final passage of the Revenue Act of 1926, (on February 26 of that year) that Congress undertook to give express approval of the Department practice after it was aware that in the *Girard Trust Company* case that practice had been challenged. These defendants know of no rule under which it is to be presumed that Congress either knows or is charged with notice of the legal questions raised in cases pending before this Court or of the contents of arguments and briefs therein. On the other hand, there is a fairer presumption, namely, that this Court, deciding the *Girard Trust Company* case after the Revenue Act of 1926 had become effective, knew what Congress had provided therein as to the time of allowance of refunds and by its decision definitely overruled the argument now made by the Government. If the court in that case thus definitely overruled this argument, where Congress had expressly approved the practice of the Bureau as to the allowance of refunds, how much force can now be given to that argument where Congress has not undertaken to indicate in any way its view as to the date of allowance of a credit.

CONCLUSION

Accordingly, the conclusion indicated not only by the *dictum* of this Court but also by a substantially uniform line of decisions below, and the conclusion dictated by sound principles of interpretation of the statutes involved, is that these claims for credits were allowed either on August 7, 1924, when the Commissioner signed his final schedules, or on July 14, 1924, when the Collector

made his application of the credits on the unpaid taxes and reported back to the Commissioner; and that the judgment of the court below should be affirmed.

Respectfully submitted,

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Company, Respondent.

January, 1931.

SUPREME COURT OF THE UNITED STATES.

Nos. 42 and 43.—October Term, 1930.

United States of America, Petitioner, 42 *vs.* Boston Buick Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.
United States of America, Petitioner, 43 *vs.* Iron Cap Copper Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[February 2, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

These cases involve the same question as *United States* v. *Swift & Co.*, No. 56, decided this day; namely, what constitutes the allowance of a credit to a taxpayer who has overpaid his income or profits taxes. The issue is made on facts somewhat different from those involved in No. 56. It is whether interest to be paid on the amounts credited to the taxpayers shall be calculated as provided by § 1324 of the Revenue Act of 1921 (42 Stat. 316) or by § 1019 of the Revenue Act of 1924 (43 Stat. 346). Interest runs from different periods under these acts. As the allowance made by the Act of 1924 is more favorable to the taxpayers in these cases, they claimed interest on their credits under that act. The Commissioner awarded them interest under the Act of 1921. The date of the allowance of the credits becomes important because we have held that interest on refunds and credits must be computed according to the statutory provision in force at the time of their allowance. *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160; *Blair* v. *Birkenstock*, 271 U. S. 348.

Upon audit of respondents' returns for 1918 it was disclosed that their taxes had been overassessed for that year. In March, 1924, the Commissioner approved schedules which informed the Collector of the overassessments and instructed him to check the